DOCUMENT RESUME

02169 - [A1572563]

[Protest of Violation of Statute Conferring Grazing Rights to Tribal Lands]. B-186373. May 26, 1977. 7 pp.

Decision by Robert F. Keller, Deputy Comptroller General.

Issue Area: Land Use Planning and Control (2300).
Contact: Office of the General Counsel: General Government Matters.
Budget Function: Natural Resources, Environment, and Energy: Conservation and Land Management (302).
Organization Concerned: Department of the Army: Corps of Engineers.
Authority: (P.L. 83-776, sec. x; 68 Stat. 1191; 68 Stat. 1193). (P.L. 85-916; 72 Stat. 1766). (P.L. 85-923; 72 Stat. 1773). (P.L. 85-915; 72 Stat. 1762). P.L. 87-695. P.L. 87-734. P.L. 87-735. 76 Stat. 598. 76 Stat. 698. 76 Stat. 5704. 10 U.S.C. 2667. 16 U.S.C. 460d. B-142250 (1960). B-142250 (1961). H. Rept. 83-2484. S. Rept. 83-2489.

Solicitation by Army Corps of Engineers for leasing tracts of land at Oahe Dam site located within Indian reservation was protested by the resident tribe as a violation of statute which conferred grazing rights and fixed boundaries thereof. Decision hinged on legal interpretation of certain phrases of section X of Public Law 83-776. GAO overruled its previous decision and sustained the protest. (DJM)

Robert Centola
GGM

02169 2563

DECISION THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-186373 DATE: May 26, 1977

MATTER OF: Cheyenne River Sioux Tribe

DIGEST: As part of settlement with Cheyenne River Sioux Tribe for Oahe Dam project, section X of Pub. L. No. 83-776 gave Tribe grazing rights "on the land between the level of the reservoir and the taking line described in Part II hereof," Part II being a listing of tracts acquired by United States from Indians. Since statute used term "taking area" in seven other sections to describe Indian lands taken, use of different term, "taking line" in section X is presumed to intend different meaning. "Line" means exterior boundaries of project within reservation, and Tribe has grazing rights on all project lands within such boundaries, whether lands were acquired from Indians or non-Indians. B-142250, May 2, 1961, overruled.

Invitation for bids (IFB) No. DACW45-76-B-0500 was issued on April 9, 1976, by the Corps of Engineers, Department of the Army, to solicit bids for the leasing, for hay and/or grazing purposes, of certain tracts of land located at the Oahe Reservoir, North and South Dakota. See 10 U.S.C. § 2667 (1970); 16 U.S.C. § 460d (1970). The Cheyenne River Sioux Tribe protests the award of any lease under the IFB covering lands within the boundaries of the Oahe Reservoir which also lie in whole or in part within the exterior boundaries of the Cheyenne River Sioux Indian Reservation. Bids were opened on April 27, 1976, but award has been deferred pending resolution of the protest. The identity of bidders and amounts of bids are not material to this protest.

The protest is grounded on a single issue. The Tribe contends that the award of any lease under the IFB covering lands within the boundaries of the Reservoir which also lie within the exterior boundaries of the Reservation would violate the rights of the Tribe under the Act of September 3, 1954, Pub. L. No. 83-776, § X, 68 Stat. 1191, 1193, set forth below:

> "After the Oahe Dam gates are closed and the waters of the Missouri River impounded, the said Indian Tribe and the members thereof shall have the right to graze stock on the land between the level of the reservoir and the taking line described in Part II hereof. The said

> Tribal Council and the members of said Indian Tribe shall have, without cost, the right of free access to the shoreline of the reservoir including the right to hunt and fish in and on the aforesaid shoreline and reservoir, subject, however, to regulations governing the corresponding use by other citizens of the United States." (Emphasis added.)

At issue is the proper interpretation of the underscored language.

The background of Pub. L. No. 83-776 is summarized in the following excerpt from the report of the House Committee on Interior and Insular Affairs:

> "The Oahe Dam and Reservoir is a portion of the comprehensive plan for the improvement of the Missouri River Basin as authorized by section 9 of the Flood Control Act of December 22, 1944 (58 Stat. 887, 891). Pursuant to section 3 of the act, the Secretary of the Army is authorized to acquire all lands necessary for this project. In 1950 Congress approved an act (66 Stat. 46; Public Law 870, 81st Cong.) in which the Chief of Engineers, United States Army, jointly with the Secretary of the Interior, was authorized to negotiate separate contracts with the Sioux Indians of the Cheyenne River Reservation in South Dakota and the Sioux Indians of the Standing Rock Reservation in North and South Dakota which will provide for conveyance to the United States of the title to all tribal, allottad, and inherited lands or interests therein belonging to the Indians of the tribe which are required by the United States for the Oahe Dam and Reservoir. This act likewise provided for payment by the United States of just compensation for all the land and improvements, of relocation costs, of costs involved in the orderly removal of the Indians, and the cost of complete settlement of all their claims arising because of the construction of the Oahe project." H.R. Rep. No. 2484, 83d Cong., 2d Sess. 3 (1954).

At the time of acquisition, most of the land on the Cheyenne River Sioux Reservation was owned by Indians. Several tracts, however, were owned by non-Indians, who had acquired them at various times from former Indian owners, through direct purchase, tax sales, etc. The non-Indian lands were scattered throughout the Reservation

in what may be described as a "checkerboard" pattern. The Indian land was acquired by the United States through Pub. L. No. 83-776. The non-Indian tracts were acquired from their respective owners separately--i.e., not as part of Pub. L. No. 83-776--by purchase or condemnation. It is undisputed that the grazing rights granted by section X of Pub. L. No. 83-776 apply to "Indian lands" (lands within the exterior boundaries of the Reservation acquired by the United States from Indians pursuant to Pub. L. No. 83-776). The controversy is whether these rights also apply to "non-Indian lands" (lands within the exterior boundaries of the Reservation acquired by the United States from non-Indian owners). The IFB listed 95 separate items consisting of 170 whole or partial tracts. The Army states that 7 of these 95 items contain tracts situated within the exterior boundaries of the Reservation.

In developing our record for the resolution of this protest, we received the Army's administrative report and the Tribe's comments on that report. In addition, at the Tribe's request, an administrative conference was held on November 30, 1976, attended by representatives of both parties. Finally, the Bureau of Indian Affairs, Department of the Interior, has, at our request, submitted its views on the merits of the protest.

The Tribe's position may be summarized as follows: (1) the language and legislative history of Pub. L. No. 83-776 indicate that the section X grazing rights apply to non-Indian as well as Indian lands; (2) there is an established principle of statutory construction, recognized by the Supreme Court, that statutes passed for the benefit of Indian tribes are to be liberally construed in favor of the Indians; and (3) an interpretation of section X which excluded the non-Indian tracts would produce a result impossible to administer. Army argues that (1) the language and legislative history of Pub. L. No. 83-776 indicate the intent to restrict section X grazing rights to Indian lands; and (2) the restriction of these rights to Indian lands is supported by prior decisions of the Comptroller General. The Bureau of Indian Affairs supports the Tribe's position.

The legislative history of section X is sparse and inconclusive. The sectional analyses in the reports of the House and Senate Committees on Interior and Insular Affairs provide merely a brief summary statement without further explanation. H.R. Rep. No. 2484, supra, at 7; S. Rep. No. 2489, 83d Cong., 2d Sess. 5 (1954). In a letter dated March 12, 1953, to the Chairman of the House Committee, the Secretary of the Army made the following comment on the proposed section X:

> "Section X would give the Indians, without cost, perpetual grazing rights between the taking line and the reservoir and hunting and fishing rights on the lands and reservoir. Such a blanket provision would involve complications since there are numerous tracts within the reservation which are owned by non-Indians. It is accordingly recommended that section X be eliminated. Under normal Department practice the Indians would then, as former landowners, receive preferential treatment in the granting of leases for use of land for grazing or other purposes upon payment of fair rental value." H.R. Rep. No. 2484, supra, at 11.

The Tribe contends that the enactment of section X without change after receipt of this comment indicates a clear intent to include non-Indian lands within the scope of the section X grazing rights. Army disagrees, arguing that the Secretary's comment merely expressed concern over "potential difficulties in the leasing of lands acquired from non-Indians, when those lands lie near other parcels which, by virtue of section X, would be used by Indians who would not be required to enter into leases with the Government at fair rental value." The legislative history provides no further illumination. In view of the following discussion, we see no need to resolve this point.

The language of section X must be viewed in its statutory context. Pub. L. No. 83-776 is divided into parts I and II. Part I, consisting of sections I through XVI, sets forth the general provisions and terms of the acquisition agreement between the United States and the Tribe. Part II is a tract-by-tract listing of the "lands conveyed by this agreement." It is significant that the term "taking area" is used several times throughout the statute. Section III authorizes assistance in relocating Indian cemetaries, tribal monuments and shrines "within the taking area . . . described in Part II of this Act." Section V provides for rehabilitation of tribal members residing on the Reservation at the time of enactment, "whether or not residing within the taking area of the Oahe Project." Section VI reserves to the Indians all mineral rights "within the taking area as described in Part II hereof." Section VII reserves timber rights "within said taking area." The term "taking area" also appears in sections IX (3 times), XI (twice), and in XII. In contrast, the term "taking line" appears only once, in section X. (Underscoring added.)

It seems clear that the "taking area described in part II" means those tracts listed in that part. Since Part II lists only former Indian lands, the term "taking area" in Pub. L. No. 83-776 refers to those lands only. The fact that Congress used a different term in section X--taking line--raises the presumption that Congress intended

a different meaning. Catalanello v. Cudahy Packing Co., 27 N.Y.S. 2d 637, 641 (1941), aff'd 34 N.Y.S. 2d 37, appeal denied 35 N.Y.S. 2d 726; In Re Kesl's Estate, 117 Mont. 377, 161 P.2d 641, 645-46, (1945). The legislative history does not provide sufficient basis to rebut this presumption since, whatever the relative merits of the respective arguments over the meaning of the Secretary of the Army's 1953 comments, we cannot say that the Army's argument with respect to these comments is clearly correct and that the Tribe's is clearly incorrect. Before proceeding, it should be noted that the actual language of section X is not completely free from ambiguity since Part II does not describe a "line" in the sense of an essentially one-dimensional measure. Nevertheless, if Congress had intended to limit grazing rights to Indian lands, it could easily have granted those rights "within the taking area described in Part II" or "on those lands conveyed by this agreement;" that is, it could easily have used language consistent with that used in seven other sections of the same statute. Assuming, as we must, that Congress selects statutory language with a purpose, the most obvious "line" that Congress could have intended would be the taking line (i.e., exterior boundary) of that portion of the project situated within the Reservation, a line which was clearly defined at the time of the consideration and enactment of Pub. L. No. 83-776. Also, because of the "checkerboard" pattern of the tracts, it would be impossible to draw a single line connecting the exterior boundaries of the Indian lands without including non-Indian lands. We thus conclude that the "taking line described in Part II," for purposes of section X, is a line circumscribing that portion of the Oahe Dam project which lies within the exterior boundaries of the Reservation, and that the land "between the level of the reservoir and the taking line described in Part II" therefore includes the non-Indian lands.

Physiographic and administrative considerations lend strong support to this conclusion. As the Tribe points out, "if all the tracts described in Part II of the Act were located upon a map, the former non-Indian owned lands which the Army wishes excluded would appear wholly interspersed with and sometimes surrounded by Indian lands." We must assume Congress was aware of this in enacting Pub. L. No. 83-776. The Tribe also states that Indian land and non-Indian land within the Reservation cannot be separated by fencing, and "[w]ithout the aid of permanent fencing, it is impossible to prevent one lessee's livestock from straying onto land leased by another." Further, we would assume that there are optimum periods during the year for grazing, and that all users would be grazing simultaneously during these periods. The Tribe argues that, in view of considerations such as these, an interpretation which excludes non-Indian lands would result in an impossible administrative burden. We hesitate to term the burden "impossible" since the Army has apparently managed to lease the non-Indian

lands for several years. Nevertheless we agree that the Army's interpretation could produce extremely difficult problems in terms of access and simultaneous use, which could result in significant dilution of the Tribe's grazing rights with respect to the Indian lands. These problems are in large measure peculiar to grazing and would not appear significant in the allocation of mineral or timber rights. These considerations form part of the context in which Congress enacted Pub. L. No. 83-776 and, when viewed in relation to the statutory language discussed above, support the conclusion that Congress chose to resolve these potential difficulties by including the non-Indian lands within the scope of the section X grazing rights.

Next, Army cites as controlling, a prior decision of this Office, B-142250, July 25, 1960, as modified by B-142250, May 2, 1961, concerning somewhat similar statutes. The 1960 decision held that § 5 of Pub. L. No. 85-916 (September 2, 1958), 72 Stat. 1766, and § 5 of Pub. L. No. 85-923 (September 2, 1958), 72 Stat. 1773, applied to all lands between the water level of the reservoir and the exterior boundary of the "taking area" involved in those statutes, whether those lands were formerly owned by Indians or non-Indians. The Army requested reconsideration, pointing out that the non-Indian lands had not been acquired in the condemnation proceedings described in the cited statutes. The 1961 decision modified the earlier holding by restricting the application of the grazing provisions to former Indian-owned lands. The 1961 decision also applied to §10 of Pub. L. No. 85-915 (September 2, 1958), 72 Stat. 1762.

We have carefully reviewed B-142250 and compared Pub. L. No. 83-776 with the three statutes involved in that decision. Based on this review, we now believe our 1961 decision was incorrect. The pertinent provisions of Public Laws 85-915, 85-916, and 85-923 gave the Indians involved in those statutes "exclusive permission, without cost, to graze stock on the land between the water level of the reservoir and the exterior boundary of the taking area" (emphasis added). The nature of the "taking area" was described specifically in section 16 of Pub. L. No. 85-915 as being the 55,993.82 acres acquired from the Standing Rock Sioux Tribe under section 1 of that Act. While there is no similar provision in Pub. L. No. 85-916 or 85-923, section 1 of both Acts refers to the "taking of lands" in certain specified condemnation proceedings which are solely concerned with lands formerly owned by Indians. Thus we feel that, in all three Acts the term "taking area" refers to former Indian-owned lands only. Nevertheless, the "exclusive permission" was not limited to "the taking area". It covers an area bounded on one side by the level of the reservoir and on the other side by the exterior boundary of the taking area. The "exclusive permission" thus seems clearly to apply to all lands between these two lines, there being no basis in the statutes or legislative histories to treat differently lands between those lines which were acquired from Indians and lands between those lines which were acquired from non-Indians. Accordingly, it is now our view that B-142250, July 25, 1960, stated the correct interpretation. B-142250, May 2, 1961, is hereby overruled.

Army further states that its leasing procedures have been implemented with respect to the lands in question since 1960, and that the Tribe's "longstanding silence" represents acquiescence in the leasing program. While we do not know the reason for this silence, it does not appear to have prejudiced the Army in any way and we do not believe it may properly be used now to extinguish the Tribe's statutory rights under the facts and circumstances of this case.

As a final note, we have reviewed the texts and legislative histories of several other statutes relating to the Missouri River Basin project. See Pub. L. No. 87-695 (September 25, 1962), 76 Stat. 598; Pub. L. No. 87-734 (October 3, 1962), 76 Stat. 698; Pub. L. No. 87-735 (October 3, 1962), 76 Stat. 704. These statutes and their derivative bills contain a number of different versions of grazing provisions, and there is some indication in the legislative histories that the problem of Indian versus non-Indian lands was recognized. While the differences in language create some confusion, we have not found sufficient basis to alter our conclusion with respect to section X of Pub. L. No. 83-776, the first of the Missouri River Basin settlement statutes.

In sum, we conclude that the grazing rights granted by section X of Pub. L. No. 83-776 apply to all lands within the boundaries of the Oahe Dam project which also lie within the exterior boundaries of the Cheyenne River Sioux Indian Reservation, regardless of whether those lands were acquired by the United States from Indians or non-Indians. We also note that section X confers a "right" rather than "permission" as granted in the other Missouri River Basin statutes. Any actions proposed by the Army with respect to these lands should accordingly be carried out in a manner consistent with these rights.

P.T.K.

Deputy Comptroller General
of the United States